UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GLEN A. WITHAM,	)	
	)	
Plaintiff	)	
	)	
v.	)	2:12-cv-00146-NT
	)	
CORIZON, INC., et al..,	)	
	)	
Defendants	)	

ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED WITH PREJUDICE AS TO FEDERAL CLAIMS AND REMANDED AS TO STATE LAW CLAIMS

Federal law is clear. The relevant statutory provision, 28 U.S. § 1446(b), requires that a notice of removal be filed within 30 days after "receipt by the defendant, through service or otherwise, of a copy of the initial pleading." The time limit is intended to serve two purposes: (1) it forecloses a defendant from adopting a "wait and see" approach in the state court and (2) it "minimizes the delay and waste of resources involved in starting a case over in federal court after substantial proceedings have taken place in the state court." Gorman v. Abbott Labs., 629 F. Supp. 1196, 1199 (D. R.I. 1986) (Selya, J.). Both of those concerns are implicated by the notice of removal in this case because the state court had made some substantive rulings upon the operative complaint and extensions of deadlines.[1]

The statute provides that "receipt" of the pleading is sufficient. Courts are split over whether the thirty-day period begins upon proper service or upon receipt of the complaint. New World Techs., Inc. v. Comy Tech., Inc., 876 F. Supp. 6, 8 (D. Mass. 1995). In a case such as this

[1] These state court rulings arise from undocketed pleadings and other procedures that are foreign to federal practice involving prisoner litigation. In this Court, pursuant to the directive of the First Circuit Court of Appeals, the service of pleadings in prisoner or other *in forma pauperis* pro se litigation is a responsibility that the Court must assume and the kind of wasteful expenditure of everyone's resources involving a "song and dance" over technical service requirements which is exemplified by this case would not have occurred. See Dist. Of Me. Local Rule 4, historical notes, and Laurence v. Wall, 551 F.3d 92, n. 1 (1st Cir. 2008)

one, where the state court record is extremely murky regarding the procedural history of the case, it is virtually impossible for this Court to ascertain any date except the date by which the defendants, through their counsel, had actual knowledge of what appears as the only operative complaint in this Court. Therefore it seems apparent to me based on the state court's docket entries and defendants' counsel's own pleadings in state court that the 30 days commenced no later than February 28, 2012. Removal was not made until May 1, 2012.

The State Court Docket

According to the state court docket entries that were filed in this Court as part of the official record (ECF No. 1-2), the complaint was filed in state court on February 28, 2012. The three removing defendants acknowledged receipt of service on February 13, 2012, and February 28, 2012. On February 28, 2012, plaintiff Witham filed a letter with the state court explaining some confusion over an undocketed earlier version of the complaint. The state court granted Witham leave to proceed in forma pauperis. On March 2, 2012, the defendants filed a motion for enlargement of time to answer. On March 27, 2012, the state court filed an order indicating the following: "Defendants do not need to file a response to the first verified complaint, dated 1/3/12 and the second verified complaint, dated 2/19/12, will be the plaintiff's operative pleading for which a response is required within 30 days upon service, assuming service is properly effectuated and plaintiff properly files the second verified complaint with the court." (Id. at 2.) On the same date, removing counsel entered his appearance on the record, indicating he had appeared in the case as of March 2, 2012. It appears that only the February 28th letter from plaintiff has been transmitted with the state court record (ECF No. 4-10), although the state docket entries reference a second letter filed on March 27, 2012. I cannot locate that document.

The document filed as the operative complaint in this Court is the verified complaint dated February 19, 2012, with numerous attachments, docketed in this court at ECF Nos. 3-1, 3-2,3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-10, 3-11, 3-12, 3-13, 3-14, 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, 4-8, 4-12, 4-13, and 4-14. Sandwiched in amongst these plaintiff's exhibits is a copy of defendants' motion to enlarge deadlines (ECF No. 4-9). This motion appears to be the only cogent explanation of what happened in this case pertaining to an "undocketed" first verified complaint and it conclusively establishes that the defendants were aware by February 28, 2012, that the second verified complaint was to become the operative pleading in this case. It appears that they were awaiting "service" of the second verified complaint, although they had already received a copy of the same. Apparently no further "service" ever happened, although the state court opened the case and the defendants had received a copy of the operative complaint. The defendants decided, out of the blue apparently, to remove this entire matter on May 1, 2012. Included with the documents filed with this Court is an acknowledgement of service signed by defendants' counsel and dated February 13, 2012. (ECF No. 4) Apparently this particular acknowledgement related to the undocketed January 23, 2012 complaint, although the state court docket reflects that the state court docketed two acknowledgements of service from each defendant, one on February 13, 2012, and one on February 28, 2012. I am unable to locate six separate acknowledgements of service in the record. The only acknowledgement appears to be the one signed by counsel on February 13, 2012.

Show Cause

The present posture of this case makes a sua sponte remand seem like adding insult to injury in terms of wasting judicial resources. The matter came to my attention because an unopposed motion to dismiss was referred to me following the expiration of the time period for

plaintiff's response. In other words, the plaintiff does not oppose this Court's dismissal of the case nor has the plaintiff ever filed a motion to remand the case and the time period for doing so under 28 U.S.C. § 1447 has now expired. There is no question but that this Court has subject matter jurisdiction over any federal claims asserted in the complaint. Given the procedural posture of the case and given that defendants' motion correctly posits that the complaint fails to state a claim[2] under the Eighth Amendment, the Americans with Disabilities Act, or Section 504 of the Rehabilitation Act, my recommendation would be that all federal claims be dismissed with prejudice and that remaining state claims, whether brought pursuant to the Maine Human Rights Act or as tort claims alleging medical malpractice, be remanded to state court.

I want to make sure that all parties understand the scope of my proposed disposition of this case. Therefore I will order that both plaintiff and the defendants have until June 26, 2012, to show cause why the federal claims in the second verified complaint should not be dismissed with prejudice and any remaining state law claims remanded to the state court.

So Ordered.
June 13, 2012 /s/ Margaret J. Kravchuk
U.S. Magistrate Judge

WITHAM v. CORIZON INC et al
Assigned to: JUDGE NANCY TORRESEN
Referred to: MAGISTRATE JUDGE MARGARET J. KRAVCHUK
Case in other court: Maine Superior Court, Knox County, CV-12-00006
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 05/01/2012
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

GLEN A WITHAM represented by **GLEN A WITHAM**
50180
BOLDUC CORRECTIONAL

[2] Defendants also claim that plaintiff failed to exhaust prison grievance procedures, but plaintiff alleges that he did so. This case cannot resolve on that basis without a summary judgment record.

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PRO SE

V.

Defendant

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